IN THE MATTER OF GENESEE POWER STATION

PSD Appeal Nos. 93–1 through 93–7

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided October 22, 1993

Syllabus

The Environmental Appeals Board has received nine petitions seeking review of a Prevention of Significant Deterioration (PSD) permit issued to Genesee Power Station Limited Partnership (Genesee) for construction of a 35-megawatt steam/electric power plant designed to burn several types of wood waste. The PSD permit was prepared under an EPA delegation by the staff of the Air Quality Division of the Michigan Department of Natural Resources (MDNR) and issued by the Michigan Air Pollution Control Commission (Commission). Several petitioners argue that the opportunities for public participation in the decisionmaking process leading up to the issuance of the permit were not adequate. The Society of Afro-American People charges that the decision to locate the facility near a predominantly African American neighborhood represents environmental racism. The petition filed by the American Lung Association of Michigan raises the following issues: (1) whether a baghouse/dry scrubber combination is BACT for particulate matter and lead emissions; (2) whether "fuel blending" is BACT for nitrogen oxide emissions; (3) whether a 24-hour averaging time is appropriate for carbon monoxide emissions; (4) whether fuel cleaning is BACT for lead emissions (5) whether MDNR understated the metal content of wood to be burned at the facility; (6) whether MDNR understated the predicted concentrations of toxic metals in the facility's emissions; (7) whether the permit allows the burning of non-wood materials; (8) whether the permit adequately addresses the risk of fires in the waste piles at the facility; (9) whether Michigan will be able to enforce the permit's conditions; (10) whether the permittee must show that all major stationary sources owned or operated by it are in compliance with applicable emissions limitations and standards under the Clean Air Act.

Held: The opportunities for public participation in the permitting process were adequate. The petition of the Society of Afro-American People is denied because there is no support in the record for Mr. Dicks' claim that the Commission acted with a racially discriminatory intent. Except for the issue relating to the BACT determination for lead, review of the petition of the American Lung Association of Michigan is denied because it fails to identify any clear error of fact or law or important policy matter warranting review. With respect to the BACT determination for lead, the permit is being remanded to the Commission so that it may consider fuel cleaning (removal of wood painted or treated with lead-bearing substances) as a control technology for lead emissions. The Board is also denying review of petitions submitted by the following groups and individuals either because they do not meet the require-

ments governing the filing of petitions or because they are not stated with sufficient specificity to allow for meaningful review: Flint Branch of the NAACP; Flint/Genesee Neighborhood Association; Linda Elston and Betty Strong; Genesee County Medical Society; Violet Worthington; Cherie N. Misner; and Sister Marjorie Polys.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge McCallum:[1]

The Environmental Appeals Board has received nine petitions seeking review of a Prevention of Significant Deterioration (PSD) permit issued to Genesee Power Station Limited Partnership (Genesee) for construction of a 35-megawatt steam/electric power plant designed to burn several types of wood waste. The PSD permit was prepared under an EPA delegation by the staff of the Air Quality Division of the Michigan Department of Natural Resources (MDNR) and issued by the Michigan Air Pollution Control Commission (Commission). *See* 40 CFR §52.21(u) (authorizing Administrator to delegate responsibility for conducting source review under Section 52.21). As requested by the Board, the Commission through MDNR filed a response to six of the petitions (as discussed below, three other petitions were not filed in a timely fashion). Although not requested to do so by the Board, Genesee also filed a brief containing its responses to the petitions. For the reasons set forth below, with respect to one issue raised by the American Lung Association of Michigan, we are remanding the permit to the Commission so that it may reconsider its determination of the best available control technology for lead emissions. With respect to all other issues raised in the petitions, we are denying review.

I. *BACKGROUND*

Genesee proposes to install and operate a 35-megawatt steam/electric power plant designed to burn several types of wood waste including demolition debris, pallets, dunnage, construction waste, tree trimmings, landclearing/inforest and sawmill residue. The plant, which will use a spreader stoker system to burn the fuel, will be located northeast of Flint, Michigan in an industrial park.

[1] Pursuant to an order dated October 22, 1993, the Board is deleting portions of its September 8th Order Denying Review in Part and Remanding in Part. This revised opinion reflects those deletions and minor rhetorical changes necessitated by such deletions. This opinion replaces and supersedes, *nunc pro tunc,* the September 8th opinion. Neither the language deleted from the September 8th opinion nor the fact that such language was deleted has any precedential value in this or any other case.

New major stationary sources of air pollution, such as the proposed Genesee facility, are required under the Clean Air Act to obtain an air pollution permit before commencing construction. If the facility is in an area where one or more national ambient air quality standards (NAAQS) are not being violated (attainment and unclassified areas), the permit is referred to as a prevention of significant deterioration of air quality (PSD) permit. CAA § 165, 42 U.S.C. § 7475. If the facility is in an area where the NAAQS are being violated (nonattainment area), the permit is referred to as a nonattainment area permit. CAA § 173, 42 U.S.C. § 7503. The PSD and nonattainment area permit requirements are pollutant-specific. For example, although a facility may emit many air pollutants, a PSD or nonattainment area permit will regulate only those pollutants that will be emitted in sufficient quantities to trigger the PSD or nonattainment area requirements. Also because a source may be located in an area that is attainment or unclassified for some pollutants and simultaneously nonattainment for others, the source may be required to obtain both PSD and nonattainment area permits.

Of the six pollutants for which NAAQS have been established (criteria pollutants), the area in which the proposed Genesee facility would be built is attainment for five (PM–10 (particulate matter with particle diameter < 10 microns), carbon monoxide, lead, nitrogen oxides, and sulfur dioxide) and nonattainment for the sixth (ozone). The PSD permit under consideration here imposes emissions limitations for the following four criteria pollutants: PM–10, carbon monoxide, nitrogen oxides, and lead. The permit does not impose an emissions limitation for sulfur dioxide, because that pollutant is not expected to be emitted in sufficient quantities to trigger the PSD requirements. The PSD permit also does not impose an emissions limitation for ozone, because the proposed site is in an area that is nonattainment for that pollutant.

In addition to the four criteria pollutants addressed in the permit, the permit also contains an emissions limitation for beryllium, for which a NAAQS has not been set.[2] The permit also contains

[2] The permit indicates that the emission limitation for beryllium is "based on a determination of the Best Available Control Technology (BACT) pursuant to the federal Prevention of Significant Deterioration (PSD) regulations, 40 CFR 52.21(j)." Special Condition 18, Final Permit. However, the 1990 Clean Air Act Amendments exempted beryllium from federal PSD review. In those amendments, Congress expanded federal regulation of toxic air emissions to 189 "hazardous air pollutants" listed in the amended Section 112(b)(1). At the same time, however, Congress expressly exempted the toxics listed in that section from specific federal PSD review. Beryllium is one of the toxic pollutants listed in Section 112(b)(1). Hence, we do not understand

State requirements relating to emissions of toxic pollutants that are not subject to PSD review.[3]

The emissions limitations imposed under the federal PSD regulations for control of PM–10, carbon monoxide, nitrogen oxides, and lead emissions are required to meet the definition of Best Available Control Technology or BACT, which is, in relevant part, as follows:

> [BACT] means an emissions limitation (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to regulation under [the] Act which would be emitted from any proposed major stationary source or major modification which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant.

40 CFR § 52.21(b)(12). Under the rules governing the PSD permitting process, the permit applicant is responsible for proposing an emissions limitation that constitutes BACT for each regulated pollutant and for providing information on the control alternatives that can be used to achieve it. 40 CFR § 52.21(n)(1)(iii). Nevertheless, regardless of the control level proposed by the applicant as BACT, the ultimate BACT decision is made by the permit-issuing authority.

To meet the emissions limitations that represent BACT for particulate matter and lead, Genesee will install a multiclone collector and an electrostatic precipitator (ESP).[4] To meet the emissions limitation that is BACT for emissions of nitrogen oxides, Genesee will install a selective non-catalytic reduction (SNCR) system.[5] To meet

why MDNR performed a BACT analysis under the federal PSD regulations for beryllium.

[3] *See* Section on BACT for PM–10 *infra*.

[4] In the ESP, gas will pass between rows or lanes of collection plates. The particulate matter will be electrostatically charged by electrodes suspended between the rows of plates, and the charged particulate will then be attracted to the collection plates that are oppositely charged.

[5] The SNCR system is designed to spray a mist of blended urea and water into the upper sections of the furnace.

the emissions limitation that is BACT for carbon monoxide, Genesee will employ proper combustion design and operation.

Genesee submitted an initial PSD permit application on June 8, 1992, and the application was deemed complete on October 1, 1992. The public comment period for the draft permit lasted 42 days, and two public hearings were held, one on October 27, 1992, and the other on December 1, 1992. The service of the notice of the issuance of the final permit decision was dated December 7, 1992. The Board has received petitions for review from the following groups and individuals: American Lung Association of Michigan (ALAM); Flint Branch of the NAACP; Society of Afro-American People; Flint/ Genesee Neighborhood Association; Linda Elston and Betty Strong; Genesee County Medical Society; Violet Worthington; Cherie N. Misner; and Sister Marjorie Polys.

II. *DISCUSSION*

Under the rules that govern this proceeding, a PSD permit ordinarily will not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. *See* 40 CFR § 124.19; 45 Fed. Reg. 33,412 (May 19, 1980). The preamble to the promulgation of these rules states that "this power of review should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional [or State] level." *Id.* The burden of demonstrating that review is warranted is on the petitioner. *In re Ogden Martin Systems of Onondaga, Inc., et al.,* PSD Appeal No. 92–7, at 2 (EAB, December 1, 1992); *In re Hawaiian Commercial & Sugar Company,* PSD Appeal No. 92–1, at 2 (EAB, July 20, 1992). For the reasons set forth below, we conclude that, with the exception of the BACT determination for lead emissions, none of the petitioners have met this burden. With respect to the BACT determination for lead emissions, we agree with ALAM that the Commission did not give adequate consideration to fuel cleaning as a control technology for such emissions. Accordingly, we are remanding the permit for further consideration by the Commission on this issue.

In the discussion below, we first address the environmental racism argument raised by the Society of Afro-American People. We then consider whether the opportunities for public participation in the decisionmaking process leading up to the issuance of the subject permit were adequate. We next focus on the arguments raised in the petition for review filed by the American Lung Association of Michigan, which challenges among other things MDNR's BACT deter-

minations for PM–10, nitrogen oxides, lead and carbon monoxide. Finally, we consider whether the other petitions for review challenging the subject permit meet the procedural requirements that govern the filing of petitions for review.

A. *Environmental Racism*

Richard Dicks, Executive Director of the Society of Afro-American People in Michigan, argues that the Commission's issuance of the PSD permit represents an instance of "governmental environmental racism," because the facility will be located near the predominantly African American Flint/Genesee neighborhood.[6] According to Mr. Dicks, this environmental racism is evidenced by the manner in which the public hearings were held. Specifically, Mr. Dicks charges that:

> This conclusion [of environmental racism] is supported by the obvious promotion by the DNR for this project. And the inability for people of color and other residents of the economically deprived area to attend, or be involved in the hearings properly, is a civil rights concern.[7]

Mr. Dicks also notes that, as the residents of the Flint/Genesee neighborhood waited for their chance to speak at the December 1, 1992 public hearing, the Commission was considering a permit application for a different facility to be located in Marquette County, Michigan. According to Mr. Dicks, the Commission denied that permit because the white residents of the surrounding community did not want the incinerator to be built:

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[6] A petition for review under § 124.19 should be timely filed with the Environmental Appeals Board. Mr. Dicks' petition was filed within the appeal period, but it was filed with the Regional Administrator of Region V, rather than with the Board. This procedural deficiency, however, does not necessarily prevent the Board from reaching the merits of this appeal. The Board has discretion to relax its procedural rules if the ends of justice so require. *See American Farm Lines* v. *Black Ball Freight Service,* 397 U.S. 532, 539 (1970) (Agency may relax procedural rules where justice so requires). Given the minor nature of the procedural deficiency and the importance of the issue involved, the Board has concluded that it is appropriate to relax its rules by treating the appeal as meeting the filing requirements. *See In re Owen Electric Steel Company of South Carolina,* RCRA Appeal No. 89–37 (Adm'r, February 28, 1992) (overlooking fact that petition was filed with the Region, rather than EPA headquarters, because of minor nature of such deficiency and importance of issues involved).

[7] The issue of whether the opportunities for public participation were adequate is dealt with in the next section of this opinion.

> Five or six white residents from Marquette, Michigan who addressed the commission just before us, live in a rural farm area that was not populated. They told the Commission that they did not want an incinerator built near their property because it might affect their farm animals.
>
> At this time one of the commissioners immediately stated that "if the people don't want this in their community we shouldn't put it there, because I sure wouldn't want it in my community." The commission then voted not to issue the permit to build the incinerator and the five or six people from Marquette left.

Mr. Dicks contrasts this treatment with the treatment received by the residents of the Flint/Genesee neighborhood, who expressed strong opposition to the location of the proposed Genesee power plant at the hearing, but failed to persuade the Commission to deny the permit. Mr. Dicks also notes that: "The commissioner that took such a strong stance for the people from Marquette, who said that they just didn't want a[n] incinerator in their community—well he said nothing in support of our plea."

In its response to comments, MDNR declined to respond to comments raising the environmental racism issue on the ground that "they are beyond the scope of Air Quality's rules and regulations." Staff Activity Report Addendum, at 8. In its Response to the Petitions, MDNR only mentions the environmental racism issue in passing. It lists the issue along with several other issues and states that it is denying review of such issues because they are "vague and/or unsubstantiated" or "not subject to federal or state air quality rules and regulations," or because petitioners have failed to provide supporting evidence. MDNR's Response to Petitions, at 19. MDNR does not specify which reason or reasons apply to the environmental racism argument.

We read Mr. Dicks' petition as arguing that the Commission acted with a racially discriminatory intent when it granted the Genesee permit. As evidence of this intent, Mr. Dicks cites the disparate treatment received by the African American opponents of the Genesee facility at the December 1, 1992 meeting: While the Commission was swayed to deny the Marquette permit by the opposition of white Marquette residents, the Commission was not swayed to deny the

Genesee permit by the opposition of the African American Flint/ Genesee residents.

Assuming without deciding that Mr. Dicks' environmental racism argument is within the scope of the Commission's authority to consider under applicable air quality rules and regulations (for Mr. Dicks does not challenge any of the emissions limitations prescribed for the facility, but rather challenges the proposed location of the facility near the Flint/Genesee neighborhood), we conclude that the Commission's action was proper in that there is no basis in the record for concluding that it acted with a racially discriminatory intent.[8]

Mr. Dicks' argument is based on the assumption that the Commission denied the Marquette County permit because the white Marquette County residents had come to oppose it. Mr. Dicks supports his contention with a remark allegedly made by of one of the Commissioners, *i.e.* "[I]f the people don't want this in their community we

[8] In his petition, Mr. Dicks does not invoke the Equal Protection clause of the U.S. Constitution. Accordingly, we do not reach the issue of whether Mr. Dicks has made out an Equal Protection claim cognizable under the Constitution, even assuming we would have authority to review such a claim. We note, however, that to make out a claim under the Equal Protection clause of the Constitution, it would be necessary to show that the Commission chose or somehow encouraged the choice of the proposed site of the Genesee facility with an intent to discriminate against the African American residents of the Flint/Genesee neighborhood. *See R.I.S.E., Inc.* v. *Kay*, 768 F. Supp. 1144, 1149 (E.D. Va. 1991), *aff'd* 977 F.2d 573 (4th Cir. 1992) (siting of landfill will not be held unconstitutional solely because it results in a racially disproportionate impact; such action violates the Equal Protection Clause only if it is intentionally discriminatory); *East Bibb Twiggs Neighborhood Association* v. *Macon-Bibb County Planning & Zoning Commission, et al.*, 706 F.Supp. 880, 884 (M.D. Ga. 1989), *aff'd* 888 F.2d 1573 (11th Cir. 1989), *aff'd as amended on denial of rehearing*, 896 F.2d 1264 (11th Cir. 1990) (County's decision to allow creation of private landfill not violative of Equal Protection Clause because evidence not sufficient to establish that decision was motivated at least in part by intent to discriminate against African Americans); *Bean* v. *Southwestern Waste Management Corp.*, 482 F. Supp. 673, 680 (S.D. Tx. 1979), *aff'd* 782 F.2d 1038 (5th Cir. 1986) (party seeking preliminary injunction held unlikely to prevail on the merits of an Equal Protection claim, where State Department of Health's decision to grant permit for solid waste facility, although "unfortunate and insensitive," was not shown to be motivated by purposeful racial discrimination). *See also* Robert W. Collin, *Environmental Equity: A Law and Planning Approach to Environmental Racism*, 11 Virginia Environmental Law Journal 495, 534 (1992) ("[P]laintiffs who make equal protection claims in environmental equity cases must prove institutional or governmental racist intent."); Note, *Remedying Environmental Racism*, 90 Michigan Law Review 394, 409 ("To mount a successful Equal Protection Clause challenge to a state's decision to site a hazardous waste facility, minority residents must prove that the decision was motivated by a discriminatory purpose."). As we subsequently conclude in the text above, there is no basis in the record to conclude that the Commission acted with the requisite racially discriminatory intent when it granted the Genesee permit.

shouldn't put it there, because I sure wouldn't want it in my community." Mr. Dicks' contention, however, is not borne out by the minutes of the December 1, 1992 hearing. Those minutes indicate that the Commission denied the Marquette permit not because of the opposition of the white Marquette County residents, but because (i) local zoning approval for the facility had been denied, (ii) the facility's proximity to a wetland would violate the federal Wild and Scenic Rivers Act, and (iii) the facility would not comply with state law. Exhibit 1, Genesee's Response to Petitions. These are legitimate, nondiscriminatory reasons for denying a permit. They suggest that the opposition of local white residents was not the basis for the Commission's decision. The minutes, therefore, negate Mr. Dicks' assumption to the contrary. Accordingly, we can find no support for Mr. Dicks' claim of disparate treatment, and a thorough search of the record has revealed no other evidence that the Commission was acting with a racially discriminatory intent when it granted the Genesee permit. Review of Mr. Dicks' petition is therefore denied.

The residents of the Flint/Genesee neighborhood, however, should not feel that the Genesee facility permit gives Genesee a license to threaten their health and safety. The record demonstrates that emissions allowed under the permit will meet all applicable air quality regulations, which are specifically established to protect human health. For example, emissions allowed under the permit will not cause a violation of the federal primary National Ambient Air Quality Standards (NAAQS), which for covered pollutants specify the level of air quality that EPA has determined will protect the public health, "allowing an adequate margin of safety." CAA § 109(b)(1), 42 U.S.C. 7409(b)(1). The permit also requires that emissions meet State health-based restrictions on toxic emissions. *See* Michigan Administrative Code R 336.1230 (Exhibit 11, MDNR's Response to Petitions). In fact, with respect to some of the pollutants that have been the subject of most concern, the predicted ambient impact of emissions will be far below levels that have been determined to protect human health. For example, the predicted ambient level for mercury is 250 times lower than the Initial Threshold Screening Level (ITSL) for mercury, which is based on a "conservative estimate of the daily exposure to the human population, including sensitive subgroups, that is likely to be without appreciable risk of deleterious effect during a lifetime." Michigan Administrative Code R 336.1115(d), R 336.1109(c), R 336.1232 (Exhibit 11, MDNR's Response to Petitions). In addition, the predicted ambient lead level is 375 times lower than the primary NAAQS for lead. MDNR's Staff Activity Report Addendum, at 7 (Response 12). Also, as discussed *infra*, the permit is being remanded

so that the Commission may consider whether fuel cleaning should be required to reduce lead emissions even further. Thus, emissions allowed under the PSD permit will not be permitted to exceed, and in certain instances will be far below, applicable air quality standards adopted to protect human health and welfare.

B. *Public Participation*

The public comment period for this permit lasted 42 days, although it was only required to last 30 days. 40 CFR § 124.10(b). Two separate public hearings were held, one on October 27, 1992 and one on December 1, 1992, although none are required unless the permit issuer determines that there is strong public interest, in which case only one is required. 40 CFR § 124.12(a). Nevertheless, several petitioners argue that the opportunities for public participation in the decisionmaking process were inadequate. (American Lung Association of Michigan, Linda Elston/Betty J. Strong, Richard Dicks). Petitioners' complaints focus on the second public hearing. Petitioners assert that the hearing was originally scheduled to begin at 10:30 A.M. on December 1, 1992, but did not get under way until much later in the day because the Commission had rescheduled the hearing without notifying anyone. As a result, some opponents of the facility had to wait 16 hours to speak, until after midnight. When opponents of the facility did get their chance to speak, two Commission members apparently talked and laughed while the opponents stated their objections. According to petitioners, even though the hour was late, the Commission refused to reschedule the meeting because the owners of the proposed facility wanted the Commission to vote on the permit application that night. Petitioners believe that, by the time the December 1, 1992 hearing was held, the Commission members had already made up their minds, that they were not listening to the presentation made by opponents of the facility, and that they just wanted to vote on the application and go home.

ALAM also complains that the final draft permit, reflecting changes based on comments received at the first hearing and during the comment period, was not made available to the public until the December 1, 1992 public hearing. ALAM is concerned in particular about the removal from the permit of a prohibition against feeding painted wood into the incinerator. ALAM argues that this is an extensive modification, and that the timing of the release of the final draft permit prevented petitioners from preparing written comments on it before the Commission voted to approve the final permit.

In its response to the petitions, MDNR makes no effort to contradict petitioners' assertions about the December 1, 1992 hearing, thereby lending credence to those assertions. In light of those assertions, the Commission certainly appears to have been somewhat insensitive to the feelings of the people who came out to voice their objections to the proposed facility at that hearing. It probably would have been better to reschedule the hearing. Nevertheless, it is clear that the public did have a meaningful opportunity to make their views known before the December 1, 1992 hearing. In this regard, we note that petitioners have not raised objections to the conduct of the first public hearing.[9] Moreover, the changes made to the draft permit after the comment period and after the October 27th public hearing demonstrate that MDNR took seriously the comments it had received. For example, because of comments received during the public comment period and at the October 27th public hearing, the applicant was required to perform a revised State BACT review for toxic emissions, and the permit was changed to prohibit the burning of non-wood materials such as pelletized paper. Because the public did have a meaningful opportunity to express their views on the draft permit, the Commission's apparent insensitivity toward opponents of the facility at the December 1, 1992 meeting is not so serious that the Commission should be required to go through the whole process again.

As for ALAM's complaint that the comment period should have been reopened, the focus of ALAM's concerns appears to be that MDNR made the final permit less stringent than the draft permit when it removed a prohibition against introducing painted materials into the incinerator. It replaced the prohibition against burning painted wood with a requirement that the applicant submit for the Commission's approval a "wood waste procurement and monitoring plan" requiring Genesee to visually inspect all wood waste received by the facility and to remove any "unacceptable" wood waste. Special Condition 41, Final Permit.

[9] We note that the Commission did not give a full thirty (30) days advance notice before convening the October 27, 1992 public hearing. *See* 40 C.F.R. § 124.10(b)(2) ("[p]ublic notice shall be given at least 30 days before the hearing"). Notice was given on October 5, 1992, several days short of the required amount. Nevertheless, no one has objected to this departure from the prescribed procedure. Moreover, we do not believe that it in any way prejudiced the petitioners. Among other things, as noted elsewhere, the public comment period itself was extended to give members of the public more time (42 days) to prepare comments on the draft permit than the rules require (30 days).

For the reasons explained below in the section of this opinion addressing BACT for lead emissions, we conclude that the permit should be remanded so that the Commission may consider fuel cleaning (*i.e.*, removal of wood waste that is painted or treated with lead-bearing substances) in its BACT determination for lead. In view of this remand, we need not reach the issue of whether the comment period should have been reopened to allow the public to comment on the removal of the prohibition on painted wood waste from the permit.

C. *Other Issues Raised by ALAM*

BACT for PM–10: For control of PM–10, MDNR considered the following technologies: (1) an ESP in combination with a multiclone collector; (2) a baghouse (fabric filter); or (3) a baghouse in combination with a dry scrubber. MDNR determined that an emissions limitation based on an ESP with a multiclone collector was BACT for that pollutant. It explains its determination as follows:

> The most stringent control technology considered was a combination dry scrubber/fabric filter. Since this system is designed as an acid gas scrubbing system and not solely as a[n] end-particulate control device, it was considered infeasible because the combustion of waste wood does not require acid gas control. Therefore, a multiclone followed by a fabric filter or an electrostatic precipitator (ESP) are the "top" control technology alternatives being considered. Although both technologies can be designed to achieve an equivalent emission reduction, the electrostatic precipitator was selected as BACT because it is a reliable and proven technology for wood-fired boilers. The baghouse was determined to be infeasible because of the high risk of a fire caused by embers from the combustor.

Genesee's Response to Petitions, Exhibit 14.

On appeal, ALAM argues that BACT for PM–10 is either a baghouse (fabric filter) or the combination of a baghouse and dry scrubber:

> If baghouse controls were installed at the Genesee Power facility, the plant should be capable of achieving a particulate matter emission limitation less than

> 0.01 grains/DSCF (7% oxygen), which would be less than the 0.0146 grain/DSCF emission limitation proposed in the permit for particulate.

ALAM Petition, at 9. Among other things, ALAM asserts that fabric filters have been used in eight wood waste/biomass facilities in California.[10]

In response to ALAM's challenge, MDNR states that it considered the baghouse/dry scrubber combination and determined that it was infeasible because:

> [T]he dry scrubber/baghouse control technology has not been reasonably deployed on waste wood combustors. This assessment is consistent with the information contained in the BACT/LAER Clearinghouse which shows that none of the wood waste combustors (including facilities located in California) are controlled by a dry scrubber/baghouse combination.

MDNR Response to Petitions, at 7. As for the eight California wood waste facilities cited by ALAM, MDNR argues that five of those California facilities use a fluidized bed system, while three of them did not report what type of boiler they use. In a fluidized bed system, wood is burned in a hot turbulent bed composed of heated particles of ash, sand, or limestone (dry sorbent). The proposed Genesee facility, however, would use a spreader stoker system, rather than a

[10] ALAM raises the following additional objections to MDNR's BACT determination: (1) the BACT determination should have included consideration of alternative designs for baghouse control or specification of air to cloth ratios or emission limitations achievable as to baghouse control performance; (2) there was no detailed, quantitative discussion of the effect of fabric filter or fabric filter/dry scrubber control on tipping fees, nor was the information provided on the relative economics between tipping fees for a better controlled incinerator vs. alternative solid waste management tipping and processing fees (or other consideration of alternative waste management practices); (3) with respect to the risk of fire associated with the baghouse-only option, fires in or below the mechanical cyclone would be as much of a problem, if fires really were a problem; (4) the applicant should have considered low efficiency wet scrubber control, inline before a baghouse, considered for the purpose of large particle collection and flaming ember control; (5) the applicant should have considered advanced or alternate fire detection/protection/mitigation strategies considered for baghouse control; (6) dry scrubbing would have the benefit of increased particle control efficiency through particle agglomeration, reduction in flue gas temperature and amelioration of any actual/potential problems with baghouse fires, both through cooling and through introducing a non-combustible material into the collected particulate; and (7) the applicant did not distinguish between the relative emission control efficiencies of baghouse and ESP with respect to inhalable particulate (PM–10 emission control efficiency).

fluidized bed system. In a spreader stoker system, wood is burned in a pile on top of grates. MDNR argues that the fact that the fluidized bed facilities in California use baghouse technology does not dictate what BACT should be in this case because of the difference between fluidized bed systems and spreader stoker systems. Specifically, MDNR contends that with spreader stoker systems, using a baghouse would present an unacceptable risk of fire, whereas with fluidized bed systems, that risk is significantly reduced by the dry sorbent used in such systems.

In addition, MDNR also states that it rejected the baghouse/dry scrubber alternative on economic grounds as well, relying on an analysis performed by the applicant in the context of a State BACT determination for toxics (called a "T–BACT" determination) for the same facility.[11] [12] In the T–BACT determination, MDNR assumed that toxic metal control efficiency is approximately equivalent to total particulate control efficiency (with the exception of mercury). The analysis examined the cost effectiveness of using a dry scrubber/baghouse to reduce particulate emissions from the facility from 0.03 lb/MMBTU (the level established in the permit) to 0.02 lb/MMBTU. Because the analysis focused on controlling particulate matter emissions, it was tantamount to a BACT determination for particulate matter, comparing the cost effectiveness of using a dry scrubber/baghouse technology to using a multiclone separator followed by an ESP. Thus, although the determination was under State BACT requirements for toxics, MDNR cites it on appeal in defense of its rejection of the baghouse/dry scrubber combination as PSD BACT for particulate matter.

MDNR's Staff Activity Report Addendum describes the T–BACT determination as follows:

> The T–BACT analysis indicates that a decrease in particulate emissions of 23 tons per year would in-

[11] At the time MDNR issued the draft permit, it apparently had not considered the cost effectiveness of using the baghouse/dry scrubber combination, relying instead on the technical ground that the primary function of a dry scrubber is to control acid gases.

[12] *See* Rule 230(1), Michigan Administrative Code R 336.1230. The State definition of "T–BACT" is similar to the federal PSD definition of BACT:

> "T–BACT" means the maximum degree of emission reduction which the commission determines is reasonably achievable for each process that emits toxic air contaminants, taking into account energy, environmental, and economic impacts and other costs.

Rule 102(a), Michigan Administrative Code R 336.1102.

> crease the capital cost from $2,311,500 to $7,379,680. Also, the incremental cost of reducing the emissions is $48,888/ton.
>
> This cost is based on capital cost only and does not include the operating and maintenance cost, so this actual $/ton value should be much greater.

Staff Activity Report Addendum, at 3–4.[13] [14] Based on this analysis, MDNR determined that the increased cost of requiring a dry scrub-

[13] Twenty-three tons per year may at first seem like an intolerably large amount of particulate matter to release into the air. To put it in perspective, the facility without any add-on pollution control equipment would emit more than 22,000 tons per year of particulate matter. With an ESP and multiclone collector, the emissions would drop to 68.7 tons per year. A baghouse and dry scrubber would reduce the emissions by an additional 23 tons. As to the latter amount, it is useful to think of it in the following terms: if a facility without add-on controls would emit only 23 tons of particulate matter per year, such emissions would not be deemed "significant" for PSD purposes and the facility would not need a PSD permit for such emissions. *See* 40 CFR §52.21(b)(23) (definition of "significant"). A new source must emit at least 25 tons of particulate matter per year to trigger the need for a PSD permit for such emissions. *Id.*

[14] Based on the applicant's calculations, MDNR concluded that the incremental cost per ton of using a baghouse/dry scrubber combination rather than the ESP/multiclone collector combination would be $43,888/ton. A close examination of the applicant's calculations, however, reveals that the $43,888/ton figure yielded by those calculations is not the incremental cost of using a baghouse/dry scrubber combination. The applicant multiplied the total capital investment of the baghouse/dry scrubber technology, which is $7,379,680, by .135 to come up with the annualized cost of that technology based on 20 years at 12% interest. The resulting figure is $996,257/year. The applicant then subtracted the emission rate associated with the baghouse/dry scrubber combination, which is 46 tons per year, from the emission rate associated with the ESP and multiclone collector, which is 68.7 tons per year. The applicant then divided the difference, 22.7 tons per year, into the annualized cost of the baghouse/dry scrubber combination, which is $996,257/year. The resulting figure is $43,888/ton. This figure is *not* the incremental cost per ton of using the baghouse/dry scrubber combination compared to using an ESP with multiclone collector. In fact, the figure is meaningless for our purposes, because the baghouse/dry scrubber would control roughly 22,000 tons per year of particulate matter, and the applicant's calculations attribute the entire cost of controlling 22,000 tons per year to controlling just 23 tons per year. To arrive at the incremental cost of the baghouse/dry scrubber combination, the applicant should have multiplied the total capital cost of the ESP with multiclone collector, $2,311,500, by .135 (the same factor used by Genesee to determine the annualized cost of the baghouse/scrubber combination) to arrive at the annualized cost of ESP/multiclone collector combination based on 20 years at 12% interest. The resulting figure is $312,052/year. The annualized cost of the ESP with multiclone collector, $312,052/year, then should have been subtracted from the annualized cost of the baghouse/scrubber combination, $996,257/year. The resulting figure, $684,205, then should have been divided by the incremental reduction in emission rates, 22.7 tons per year. The resulting figure, $30,141/ton, is the incremental cost of using the baghouse scrubber technology. Even with this correction, however,

ber/baghouse is out of proportion to the environmental benefit that would be achieved.

With respect to the alternative of using a baghouse alone (*i.e.*, without a dry scrubber), MDNR argues that the use of a baghouse (alone) would create a high risk of catastrophic fire caused by ember carry-over from the combustor.[15] It also argues that an electrostatic precipitator "would provide an equivalent reduction in emissions of particulate as a baghouse." According to MDNR, this is supported by the data in the BACT/LAER Clearinghouse and the EPA wood study which show that wood boilers are controlled by an ESP or baghouse. MDNR Response to Petitions, at 7–8.

For the following reasons, we reject ALAM's challenge to MDNR's BACT determination for particulate matter. As we see it, MDNR's determination rests on two linchpins. First, MDNR has concluded that the improvement in control of particulates that could be brought about by using a baghouse/dry scrubber combination rather than an ESP does not justify the increased costs of using that combination. Although this conclusion was reached in the context of a State BACT determination for toxics, MDNR has made a technical determination that its T–BACT analysis is equivalent to a Federal PSD BACT analysis, and ALAM has given us no reason to question the soundness of that determination. Second, MDNR has concluded that a baghouse alone (*i.e.*, without a dry scrubber) would not be any more effective than an ESP and would present a high risk of catastrophic fire. While ALAM has raised numerous objections to MDNR's BACT determination, in our opinion it has not succeeded in shaking either of these two linchpins. It has not pointed to evidence in the record suggesting that it would be economically feasible for the applicant to absorb the increased costs associated with the baghouse/dry scrubber technology or that it would be reasonably cost effective to require the permittee to spend an additional $5 million to reduce particulate emissions by 23 tons per year. Nor has it pointed to evidence in the record suggesting that a baghouse alone would be more effective than an ESP or that a baghouse alone could be used with a spreader stoker system without a serious risk of fire. For all the foregoing

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it is readily apparent that the incremental cost of using the baghouse/scrubber combination is out of proportion to the environmental benefit that would be achieved, especially considering that these calculations are based only on the capital cost and do not include the operating and maintenance costs. Thus, despite the applicant's erroneous calculations, we nevertheless agree with MDNR's rejection of the baghouse/scrubber combination.

[15] MDNR apparently concluded that the baghouse/dry scrubber combination would not present the same risk of fire as that presented by the use of a baghouse alone.

reasons, we conclude that ALAM has not met its burden of demonstrating a clearly erroneous legal or factual conclusion or an important policy matter that warrants review.[16]

Unregulated Pollutants: In support of its contention that MDNR did not perform an adequate BACT review for PM–10, ALAM contends that MDNR did not give appropriate consideration to "unregulated pollutants." MDNR's Response to Petitions, at 7–8. Although unregulated pollutants generally do not form part of the BACT analysis, since by statute and regulation BACT is defined as an emissions limitation for a regulated pollutant,[17] that is not always the case. *In re Spokane Waste-to-Energy*, PSD Appeal No. 88–12, at 6, n.9 (Adm'r, June 9, 1989) ("[t]he focus of a BACT determination is not always on regulated pollutants."). An exception applies whenever choosing one control technology over another for a regulated pollutant has the incidental effect of increasing or decreasing emissions of unregulated pollutants. Since such an incidental effect would inevitably have an environmental impact, it has been held that the environmental impact of unregulated pollutants under such circumstances is relevant to the selection of an appropriate control technology for regulated pollutants. *In re North County Resource Recovery Associates*, PSD Appeal No. 85–2, at 3–4 (Adm'r, June 3, 1986); *In re Spokane Waste-to-Energy, supra* at 6, n.9. This holding flows from the definition of BACT, which, as noted earlier, provides that a BACT determination must include, *inter alia*, consideration of the environmental consequences of choosing one control technology over another.[18]

There is no basis, however, for reviewing ALAM's contention regarding unregulated pollutants, for ALAM neither states which pollutants it is referring to, nor indicates the nature of MDNR's allegedly deficient consideration of them. *See, e.g., In re Spokane Waste-to-Energy*, PSD Appeal No. 88–12, at 6, n.8 (Adm'r, June 9, 1989) (failure to "identify the specific regulated air pollutants that

[16] ALAM also raises the following two issues that do not relate to its baghouse-scrubber argument: (1) there was no discussion of the impact of emission controls on the cost of electricity production vs. the cost of electricity production by other means and (2) the Applicant should not have dismissed the possibility of more stringent ESP particulate emission control performance without a detailed economic discussion on tipping fees and the overall economic analysis of the proposed plant. These issues are not stated with sufficient specificity to permit meaningful review. Accordingly, review of these issues is denied.

[17] *See* CAA § 169(3), 42 U.S.C. § 7479(3) (definition of BACT) (BACT analysis need only be done on a pollutant if the pollutant is "subject to regulation under this chapter"); 40 CFR § 52.21(b)(12) (definition of BACT).

[18] *See supra* p. 808.

supposedly do not meet BACT requirements" contributes to the "serious lack of specificity in the petition"); *In re Broward County, Florida*, NPDES Appeal No. 92–11, at 5 (EAB, June 7, 1993) (petitions for review of NPDES permits must state issues with specificity); *In re Terra Energy Ltd.*, UIC Appeal No. 92–3, at 3 (EAB, Aug. 5, 1992) (same re UIC permits). Therefore, the petition is deficient for lack of specificity.

We are aware, of course, of ALAM's particular concern about emissions of toxic substances, including mercury, lead, arsenic, and chromium, from the burning of painted or treated demolition wood. With the exception of lead, however, emissions of these toxic substances are exempt from PSD regulation, pursuant to the 1990 Amendments to the Clean Air Act. CAA § 112(b)(6), 42 U.S.C. § 7412(b)(6); *In re Robbins Resource Recovery Company (Robbins, Illinois)*, PSD Appeal No. 90–8, at 9 (Adm'r, July 30, 1991). It is conceivable that ALAM may be referring to these exempt toxic substances when it speaks of "unregulated pollutants." Although such substances may in fact be regulated under other non-PSD provisions of the Act, they are nevertheless unregulated for purposes of the PSD provisions of the Act. Therefore, by analogy, an argument can be made that the same analysis that is required of unregulated pollutants should also be required of the exempt toxic substances.[19] If ALAM's contentions are indeed meant to be framed along these lines, they still do not raise an issue warranting review. The record demonstrates that MDNR gave closer consideration to these substances than is ordinarily given to unregulated pollutants. It will be recalled that, although MDNR was not required to perform a BACT review for the exempted toxics, it did perform a T–BACT review for these substances under State law. Staff Activity Report Addendum, at 3–4. Based on that review, MDNR concluded that a multiclone collector followed by an ESP is preferable to the baghouse/dry scrubber technology advocated by ALAM.[20] MDNR determined that the increased

[19] Although the exempt toxics are not "unregulated pollutants" in any strict sense, they are nevertheless unregulated for purposes of the PSD provisions of the Act; therefore, any increase or decrease in emissions levels of these toxics resulting from the technology chosen for controlling a "regulated pollutant" will presumably have environmental impacts that are conceptually indistinguishable from the environmental impacts of unregulated pollutants considered in *North County* and *Spokane*.

[20] MDNR notes an exception in the case of mercury, since it concludes that control of particulates by the multiclone collector/ESP technology chosen as BACT does not provide equivalent control over mercury emissions. ALAM argues that a scrubber/baghouse coupled with sodium sulfide or activated carbon addition could be used to collect mercury emissions. ALAM has not demonstrated, however, that the use of these materials in conjunction with a scrubber/baghouse is among the technologies

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cost of requiring a baghouse/dry scrubber is out of proportion to the environmental benefit that would be achieved from employing the other technology.[21] Thus, even if we overlook the general lack of specificity of ALAM's assertion that MDNR did not give adequate consideration to unregulated pollutants, it is readily apparent that MDNR did in fact give close attention to this particular category of "unregulated pollutants." Therefore, to that extent, ALAM's petition for review clearly lacks merit.

BACT for Lead: Although elemental lead is a toxic substance, it is in a class by itself for purposes of regulatory control. This is because it is still subject to federal PSD BACT review (assuming the facility in question has the potential to emit more than 0.6 ton of lead per year), and it is not one of the toxics that must be considered under the State's T–BACT review. MDNR determined that lead emissions for the facility would exceed 0.6 ton per year and accordingly performed a PSD BACT review for lead. MDNR assumed that because lead control efficiency is approximately equivalent to total particulate control efficiency, the BACT determination for control of

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available for controlling a regulated pollutant, such as PM–10. Such a demonstration is necessary, as explained in *In re Spokane Waste-to-Energy*, PSD Appeal No. 88–12, at 6, n.9 (Adm'r, June 9, 1989):

> Unless the advocated additional control technology is available for the primary purpose of controlling emissions of regulated pollutants, the permit issuer is not required to include that control technology in the BACT analysis or consider, as a secondary matter, the effect of that technology on unregulated pollutants or its other collateral environmental impacts.

Accordingly, we see no basis for reviewing ALAM's contention regarding the use of sodium sulfide or activated carbon.

[21] Although as indicated in the previous footnote, MDNR concluded that control of particulates by the multiclone collector/ESP technology chosen as BACT does not provide equivalent control over mercury emissions, MDNR nevertheless concludes that the environmental impact of mercury emissions from the proposed facility will be negligible.

> [W]e have evaluated the emissions of mercury based on the worst case scenario, and the emission of mercury was found to be environmentally acceptable. Also, we have added emission limits and stack testing requirements for mercury to ensure that the applicant meets the requirements.

Staff Activity Report Addendum, at 7, Response to Petitions. This conclusion regarding health effects is confirmed by MDNR's Health Screening Analysis, which shows that predicted ambient impact for mercury is 250 times less than the Acceptable Ambient Level, which in the context of mercury emissions means a "conservative estimate of the daily exposure to the human population, including sensitive subgroups, that is likely to be without appreciable risk of deleterious effect during a lifetime." Michigan Administrative Code R 336.1115(d), R 336.1109(c), R 336.1232 (definition of Initial Threshold Screening Level).

particulates applies to lead as well. Accordingly, MDNR has concluded that BACT for lead is the technology selected for controlling particulates, *i.e.*, a multiclone collector followed by an ESP.[22] ALAM questions the assumption that the control technology for particulate matter is also the control technology for lead:

> The applicant assumed that lead emission control efficiency would be exactly the same a[s] particulate emission control efficiency, with no review of data on the distribution of lead emissions by particle size category.

ALAM Petition, at 11. MDNR's conclusion that lead emissions are controlled by the same technology that controls particulate emissions, however, is the kind of technical determination that is best left to the State to decide. Absent some demonstration by ALAM that the data on particle size contradict MDNR's conclusion, we are not inclined to second guess MDNR's judgment. ALAM had the burden of raising such a compelling reason, but has not done so. ALAM has pointed to nothing in the record suggesting that the control technology for lead might be different from the control technology for particulate matter. Accordingly, review of this issue is denied.[23]

Fuel Cleaning: ALAM also argues that Genesee should practice fuel cleaning to reduce emissions of lead and other toxic pollutants. Fuel cleaning is specifically mentioned in both the statutory and regulatory BACT definitions as a potential control technology.[24] In

[22] As discussed above, ALAM challenges MDNR's determination that a multiclone collector followed by an ESP is BACT for particulate matter, arguing that a baghouse with or without a dry scrubber is BACT for particulate matter. That argument has been addressed above in the discussion concerning BACT for particulate emissions.

[23] In rejecting ALAM's argument, we note that the predicted ambient lead levels allowed under the permit are 375 times less than the primary National Ambient Air Quality Standard (NAAQS) for lead. The primary NAAQS for a pollutant specifies the level of air quality that EPA's Administrator determines will protect the public health, "allowing an adequate margin of safety." CAA § 109(b)(1), 42 U.S.C. 7409(b)(1).

[24] The statutory definition of BACT provides in pertinent part that:

> The term "best available control technology" means an emission limitation * * * which the permitting authority * * * determines is achievable * * * through application of production processes and available methods, systems, and techniques, including *fuel cleaning* * * *.

CAA § 169(c), 42 U.S.C. 7479 (emphasis added). The regulatory definition of BACT similarly provides in pertinent part as follows:

> *Best available control technology* means an emissions limitation * * * which the Administrator * * * determines is achievable

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the context of Genesee fuel cleaning means removal of wood waste that has been painted or treated with substances that contain lead and other toxic substances. ALAM contends that fuel cleaning should be practiced in addition to using whatever add-on technology is ultimately selected as BACT.

The permit already contains a fuel-cleaning requirement, but ALAM criticizes it as being deficient in certain respects. The permit requires Genesee to develop a "wood waste procurement and monitoring plan," which must be used "at all times to prevent the inclusion of unacceptable material in the waste wood supply." This plan must be submitted to and approved by the Commission before the boiler is operated. Final Permit, Special Condition 41. The permit provides that:

> As part of the plan, the applicant shall visually inspect all wood waste after it has been received and suspect unacceptable wood waste shall be segregated. All unacceptable wood waste shall be removed to an approved disposal site.

Id. The permit further provides that unacceptable wood wastes include the following:

1. Unprocessed construction and demolition wood
2. Unprocessed wood obtained directly from landfills
3. Wood containing plastics or vinyl
4. Pressure-treated wood
5. Railroad ties
6. Telephone poles
7. Marine pilings
8. Bridge timbers

Final Permit, Special Condition 42.

ALAM argues that these permit provisions are inadequate to prevent the burning of wood that has been treated or painted with toxic materials, because the types of wood wastes that are specifically prohibited in the quoted list are "poorly defined without specific reference to state and federal law and regulation" and because "the so-called 'unacceptable' wastes would not be regulated by any specific quantifiable performance or effective work practice standard that could be measured and enforced, or that could be quantified as to

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* * * through application of production processes or available methods, systems, and techniques, including *fuel cleaning* * * *.

40 CFR § 52.21(b)(12) (emphasis added).

numeric efficiency control." ALAM Petition, at 15–16. ALAM is also concerned because the task of removing painted and treated wood from the fuel supply will be performed by the wood waste supplier, not by Genesee. ALAM is skeptical that a contract waste supplier outside the control of Genesee will be able to remove painted wood from the waste stream by hand-picking such materials, because hand-picking will be ineffective with materials that have been crushed or materials that have been pressure-treated or treated with pesticides. In addition, ALAM believes that Genesee's reliance on the supplier to produce "clean" urban wastewood is misplaced because of:

> limited urban budgets for demolition, the current number of unregulated demolition operators in Michigan, the time and labor required for this type of practice, the prevailing patterns of operation in the demolition industry and significant occupational health and safety problems of this technique in demolition operations.

ALAM Petition, at 20. Beyond voicing these criticisms, however, ALAM does not make any specific (or comprehensive) proposals to modify the permit's existing fuel-cleaning requirements to correct the alleged deficiencies. Instead, it asserts in conclusory fashion that the permit should provide "effective, legally enforceable, specific performance standards on fuel quality, minimum BTU content, maximum moisture content and maximum toxicant content." *Id.* at 15

In response, MDNR asserts that there is no legal obligation to include a fuel cleaning provision in the permit as part of the BACT determination. It claims that control of the facility's emissions of lead and other toxic pollutants by means of fuel cleaning is not an "available" technology within the meaning of the BACT definition:

> [T]here is no hard data available to determine whether supplementing pollution control equipment with fuel cleaning would cause reductions or increases in pollutant emissions. Therefore, fuel cleaning was not considered as an "available" technology in the BACT determination because there is no data to indicate that it would result in any emission reductions over those obtained by the use of a multiclone followed by an electrostatic precipitator.

MDNR's Response to Petitions, at 9–10. In making this argument, however, MDNR does not attempt to explain the apparent contradiction between this position and its decision to include fuel cleaning provisions in the permit. The draft permit originally contained a flat prohibition against burning painted wood or wood treated with specified preservatives. Draft Permit, Special Condition 36. According to MDNR, however, many commenters observed that perfect compliance with the prohibition would be impossible. MDNR therefore removed the prohibition because it agreed with the commenters: No matter how conscientious Genesee was, some painted or treated wood would inevitably become part of the fuel burned by the facility. MDNR removed the prohibition from the permit and substituted the provisions discussed above. The prohibition in the draft permit and the provisions in the final permit clearly constitute forms of fuel cleaning requirements.

For the following reasons, we conclude that fuel cleaning does constitute an "available technology" for BACT purposes and that MDNR should reconsider the permit's fuel cleaning provisions in that light. As discussed below, we believe that there is merit to some of ALAM's criticisms. It is conceivable that MDNR's misconceptions respecting fuel cleaning as an available technology may have resulted in the permit's fuel cleaning provisions being drawn less stringently or carefully than might otherwise be the case.

Before beginning the discussion of the available technology issue, it is important to note at the outset that, of all the toxic pollutants that ALAM hopes to control with fuel cleaning, only lead is also subject to PSD review. Hence, consideration of fuel cleaning must take place in the context of a BACT review for lead emissions.[25] It is also worth noting that the permit contains numerical emissions limitations not only for lead, but also for the other toxic pollutants that ALAM is concerned about: arsenic, chromium, mercury, hydrogen chloride, and acrolein, Final Permit, Special Condition 21, and that the permit also requires Genesee to conduct stack testing and ash testing to ensure compliance with these numerical emissions limitations. Final Permit, Special Conditions 21, 25, 27, 43. The provisions respecting these other toxic pollutants were included in the permit pursuant to State law, not federal law. Although the State law provisions are not separately enforceable under federal law, they presumably are enforceable under the terms of the final permit. We do

[25] Of course, if fuel cleaning would bring about a reduction in lead emissions, then under *North County,* the Commission could also consider the effect of fuel cleaning on other toxic pollutants that are *not* subject to BACT review.

not, however, reach any definitive conclusions in that regard. *Cf. Colmac Energy, Inc. (Riverside County, CA),* PSD Appeal No. 88–9, at 5 (Dec. 13, 1988) (although EPA does not have the authority to impose state or local requirements in a PSD permit, the permit applicant may agree to their inclusion).

As a general principle, fuel cleaning constitutes an available technology if there is evidence to suggest that its use would bring about a reduction of regulated emissions beyond the reduction achievable through the use of the add-on controls already prescribed in the permit.[26] Such a reduction in lead emissions is suggested by a wood waste study that MDNR has relied on for other purposes in its review of Genesee's permit application. *See* Draft Final Report, Wood Products in the Waste Stream, Characterization and Combustion Emissions (hereinafter New York Wood Waste Report). The New York Wood Waste Report, which discusses the relationship between the lead content of wood burned and the resulting emission rate of lead from the stack at wood waste facilities, concludes that the "stack gas emission rate appears to be a function of wood feed * * *." It notes that some of the data do not support this conclusion, but it rejects such data as an "aberration due to the interruption of a consistent wood fuel quality * * *." New York Wood Waste Report, § 3.4, at 19. The conclusion reached in the New York Wood Waste Report is consistent with the position taken by the Agency in the context of new source performance standards for municipal waste incinerators. In the preamble to the proposed new source performance standards for municipal waste incinerators, the Agency noted that:

> Removal of lead-acid vehicle batteries would result in a direct reduction in MWC metal emissions (especially lead). Also a reduction in MWC acid gas emissions (especially sulfuric acid), and reduction in MWC emissions associated with combustion of plastic lead-acid battery casings would be achieved.

[26] *See In re Spokane Regional Waste-to-Energy,* PSD Appeal No. 88–12, at 22 (Adm'r, June 9, 1989) (a materials separation program is "available" when "there are sufficient data indicating (but not necessarily proving)" that the technology "will lead to a demonstrable reduction in emissions of regulated pollutants or will otherwise represent BACT"); *In re Ogden Martin Systems of Onondaga, Inc. and Onondaga County Resource Recovery Facility,* PSD Appeal No. 92–7 (EAB, December 1, 1992) (same); *In re Brooklyn Navy Yard,* PSD Appeal No. 88–10, at 13 (Adm'r, Feb. 28, 1992) (in determining whether removal of nitrogen-containing materials was BACT for nitrogen oxides emitted from municipal waste incinerator, "threshold question * * * is whether there is sufficient indication that a separation program would reduce emissions beyond the levels achieved by the conventional control technologies already included in the permit.").

54 Fed. Reg. 52,251, 52,280 (December 20, 1989).[27] The preamble also notes that:

> The EPA believes that materials separation, used in conjunction with good combustion practices, and add-on controls, will result in further reductions of emissions from MWC's. It is simply common sense, and the Agency's expectation, that reductions in the amount of pollution-generating materials combusted in an MWC will reduce the amount of pollutants in its air emissions.

Id. at 52,281. That fuel cleaning would bring about a reduction in lead emissions even in combination with add-on controls is also suggested by the fact that the draft permit contained, and the final permit contains, some fuel cleaning requirements for control of lead emissions and other toxic pollutants. In view of the foregoing considerations, we conclude that the removal of wood that is painted or treated with lead-bearing substances would bring about reductions of lead emissions beyond the reductions achievable through the use of add-on controls alone. Such fuel cleaning, therefore, should be considered an "available" technology for purposes of the BACT definition and should have been considered in MDNR's BACT analysis for lead.

If fuel cleaning is an element of BACT for lead emissions, then the existing permit will need to be changed because the fuel cleaning requirements currently in the permit are deficient. As ALAM has argued, those requirements do not make Genesee ultimately responsible for ensuring that woods painted or treated with lead-bearing substances are removed from the facility's wood supply. Under the permit as it now reads, Genesee is only required to visually inspect the wood received at the facility to ensure that "unacceptable" wood waste is not burned at the facility. With respect to demolition and landfill waste, the term "unacceptable" means only that the wood is "unprocessed." Thus, Genesee is only responsible for making sure that demolition and landfill wood has been processed. The permit, however, does not specify what the processing of demolition and landfill wood entails. Moreover, because it contains neither numerical limits on the lead content of wood being burned at the facility nor

[27] The Agency ultimately did not include a prohibition against lead acid batteries in its new source performance standards for municipal waste incinerators, but not because it had changed its position on the relationship between the burning of lead acid batteries and lead emissions. 56 Fed. Reg. 5496 (February 11, 1991).

work practice standards, the permit does not provide a means of determining compliance with the fuel cleaning requirements. Nor does the permit require Genesee to actually do the processing itself. Under the permit, the processing of the wood could be done by Genesee's wood waste supplier, and this is in fact what Genesee and MDNR are contemplating. In its Response to the Petitions, MDNR states that it "does expect" Genesee's contract with its supplier will include a requirement that painted wood be removed from the wood waste being supplied to Genesee. MDNR Response to Petitions, at 6. The wood waste supplier, however, will not be bound by the terms of the permit, and the permit does not require Genesee to include such a requirement in the contract. Moreover, Genesee would not be responsible for ensuring that the wood supplier does a good job of processing the wood. Thus, the fuel cleaning requirements currently in the permit do not make Genesee ultimately responsible for ensuring, to the extent feasible, that wood painted or treated with lead-bearing substances is not burned at the facility. If fuel cleaning is an element of BACT for lead emissions, therefore, the permit will need to be changed to place such responsibility squarely on Genesee.

Because MDNR has taken the position that fuel cleaning is not an "available" technology, we cannot be sure that MDNR considered any fuel cleaning alternatives other than the flat prohibition that was in the original permit and the fuel cleaning provisions that are now in the permit. In light of this conclusion, we are remanding the permit to the Commission, so that it may reconsider its BACT determination for lead. On remand, it must consider whether fuel cleaning in combination with the add-on controls already in the permit is BACT for controlling lead emissions. The fuel cleaning alternatives considered by MDNR must at least include options that would make Genesee ultimately responsible for ensuring that, to the extent feasible, wood coated or treated with lead-bearing substances is not burned at the facility. In addition, these options must include some means of determining Genesee's compliance with them. It is important to emphasize that although MDNR is required to *consider* that combination in its BACT determination for lead, it does not follow that MDNR must ultimately *require* such a combination as BACT for lead. We express no position on whether MDNR should require such a combination as BACT for lead. If the Commission determines that such a combination is not BACT for lead emissions, then the permit need not be altered. Upon completion of the remand proceedings, an appeal to the Board of the Commission's decision on remand

will *not be* necessary to exhaust administrative remedies. *See* 40 CFR § 124.19(f)(iii).

BACT for Nitrogen Oxides: MDNR states that two post-combustion control technologies were considered for controlling nitrogen oxide emissions: Selective Catalytic Reduction (SCR) and Selective Non-Catalytic Reduction (SNCR). MDNR states that, although SCR is the most stringent NOx control method, it was rejected because there are no commercial applications of this technology on wood-fired boilers. The applicant originally proposed an emissions limitation for nitrogen oxides (NOx) of 0.15 pound/MMBTU. The draft permit, however, contained an emissions limitation of 0.20 pound/MMBTU, which is the limitation that ended up in the final permit. In its response to comments MDNR explained its reasons for selecting the 0.20 pound/MMBTU limitation rather than the more stringent limitation of 0.15 pound/MMBTU:

> The formation of NOx is a function of the combustion temperature, amount of excess air, and the nitrogen content of the fuel. However, the combustion temperature is also a function of the fuel heating value and moisture content of the fuel. Therefore, many factors have to be evaluated before the NOx limit is determined. The applicant submitted data which indicates the nitrogen content of the fuel is higher than originally anticipated. Thus, the NOx limit was changed to a value that the applicant could consistently achieve.

Staff Activity Report Addendum, at 5.

ALAM argues that the applicant could use "fuel blending" to manipulate the overall moisture content of the wood being burned at the facility so that a level of 0.15 pound/MMBTU could be achieved. ALAM points out that the "Applicant submitted a listing from the BACT-LAER clearinghouse showing a number of boilers meeting a NOx emission limitation less than 0.20 * * *."

In its response to ALAM's petition, MDNR does not address ALAM's fuel blending argument. Nevertheless, based on the administrative record and MDNR's response to comments in particular, we conclude that ALAM's fuel blending argument does not provide a basis for granting review. At this stage of the proceedings, ALAM has the burden of showing that MDNR's technical judgment with respect to NOx control is clearly erroneous or involves an important

policy matter that warrants consideration. We conclude that ALAM has not carried this burden. For one thing, ALAM does not describe what it means by fuel blending or how fuel blending could be carried out. Also ALAM's argument lacks empirical support. ALAM does not cite any empirical studies demonstrating that fuel blending in combination with SNCR technology would bring about a measurable reduction in NOx emissions *beyond* that achievable by the use of SNCR technology alone. Accordingly, review of this issue is denied. *See Spokane Regional Waste-to-Energy Project,* PSD Appeal No. 88–2, at 17 (Adm'r, June 9, 1989) (a technology is not available in any meaningful sense if knowledge about its effects on emissions, in the particular configuration in which it would be employed, is so incomplete as to be unusable).

BACT for CO: The permit's emission limitation for carbon monoxide (CO) is subject to a 24-hour averaging time, and its VOC limitation is subject to a 1-hour averaging time. ALAM contends that this 24-hour averaging time "raises significant questions as to the applicant's commitments to good combustion control and the maintenance of the applicant's one hour averaging time emission limitation for VOC." ALAM Petition, at 13. ALAM states:

> We question whether the Applicant can comply with its VOC limitation during the wide variations in carbon monoxide emissions arising during a 24 hour period of poor combustion. Since there is no continuous emission monitor for VOC, the CO emission compliance should be regarded as a surrogate indicator of VOC emissions. Since the Applicant indicates that good combustion control is BACT for VOC emissions, we question their commitment to this VOC BACT demonstration given the latitude of the permit for excessive carbon monoxide emissions.

Id. at 14.

We conclude that ALAM's arguments concerning the 24-hour averaging period do not provide a basis for granting review. Genesee County is designated non-attainment for VOC (ozone). VOC emissions are thus regulated as part of Michigan's State Implementation Plan (SIP) for non-attainment pollutants. 40 CFR § 52.1174. The State has determined that the proposed plant will meet the State's SIP rules for VOC non-attainment areas. MDNR Staff Activity Report, at 5, Exhibit 2 of MDNR's Response to Petitions. It is well established, however, that non-attainment issues are generally not

reviewable in the context of a PSD permit appeal. *See, e.g., In re Keystone Cogeneration Systems, Inc.,* PSD Appeal No. 91–42, at 4 (Adm'r, January 7, 1992); *American Ref-Fuel Company of Essex County,* PSD Appeal No. 86–1, at 7 (Adm'r, Oct. 8, 1986)("despite the existence of a nexus between the PSD and non-PSD provisions of the Act, EPA can keep the two separate * * *, while also accommodating the important congressional goal of placing primary responsibility for clean air in the hands of the state.") Petitioner has not persuaded us that there is any reason to make an exception to this rule. Thus, ALAM's concerns about VOC emissions are not subject to review in this forum.

As for ALAM's expressions of doubt about Genesee's "commitment" to good combustion controls, such doubts certainly cannot, without some factual basis, amount to a demonstration of clear error or an important policy issue that warrants review.[28] ALAM does cite the example of the applicant's facility in Grayling, Michigan, which is subject to an 8-hour averaging time for CO. We note, however, that the CO emissions limitation in Genesee's permit is 0.35 pounds/MMBTU, while the CO emissions limitation in the Grayling facility is 0.40 pounds/MMBTU. In the absence of some indication to the contrary (which ALAM has not shown), it does not seem unreasonable that a more stringent emissions limitation should be accompanied by a longer averaging period, since the more stringent an emissions limitation is, the harder it will be to meet it consistently. For these reasons, we conclude that the 24-hour averaging time does not provide a basis for review.

Understatement of Metal Content: Exhibit D of MDNR's Staff Activity Report Addendum lists the amount of zinc, barium, chromium, and lead found in sample demolition debris. The amounts are expressed as parts per million. For example, the content of zinc in the sample is listed as 1.20 parts per million (Dry Basis −1.20 ppm w/w). It turns out that these figures are erroneous, having resulted from an incorrect conversion of percentages (in a laboratory report) into parts per million (in Exhibit D). As a result of the error, the figures are understated by a factor of 10,000. ALAM argues that by understating the content of those four metals in the demolition debris sample, MDNR "seriously mischaracterized the nature

[28] To the extent ALAM is predicting problems in the implementation of the permit, its argument is beyond the scope of our authority to address. *See In re General Electric Company,* RCRA Appeal No. 91–7, at 14 (EAB, Nov. 6, 1992) ("[T]he role of the Board is to determine whether the permit was appropriately issued. The Board has no oversight responsibility for the implementation of a validly issued permit.")

of the demolition waste to be received at this facility." ALAM Petition, at 21.

In its Response to the Petitions, MDNR does not dispute that the content of those metals was understated by a factor of 10,000 in Exhibit D. Instead, it argues that the laboratory analysis on which those figures were based was flawed in that it was performed on the ash of demolition debris, rather than the unburned demolition debris, and that as a result, the figures yielded by the analysis are inaccurate and should be disregarded. MDNR explains that ash would have a much higher percentage of metals than the wood. Accordingly, MDNR states that:

> [S]ince the laboratory failed to analyze the trace metal content of the wood, the above-mentioned metals (lead, chromium, etc.) should be deleted from the table that appears in Exhibit D of the Staff Report Addendum. Furthermore, the incorrect lab analyses were not used in determining the final emission limits for the metals. The table in Exhibit D was provided for illustration purposes only.

MDNR's Response to Petitions at 13.

In light of MDNR's representations that the laboratory analysis was performed on the ash of demolition debris, rather than unburned demolition debris, and that the incorrect lab analyses were not used in determining the final emissions limitations for metals, we conclude that the results of the laboratory analysis are irrelevant. Thus, any mistakes in describing those results are irrelevant as well. Accordingly, review of this issue is denied.

Understatement of Emission Factors: In the column marked "Emission factors," Table 3 of MDNR's Staff Activity Report Addendum lists the predicted concentrations of nine toxic metals in the facility's emissions.[29] The predicted concentrations were taken directly from a study of wood-waste-burning facilities prepared by EPA (NY Wood Waste Report). ALAM correctly points out that the concentrations of metals in emissions in the New York Wood Waste Report are based on an assumed particulate matter emission control efficiency of 0.02 lb/MMBtu. ALAM also correctly points out that

[29] For arsenic the predicted concentration is 61.36 $\mu g/m^3$, for barium 222.99 $\mu g/m^3$, for cadmium 0.92 $\mu g/m^3$, for chromium VI 1.21 $\mu g/m^3$, for copper 53.07 $\mu g/m^3$, for lead 447.97 $\mu g/m^3$, for mercury 0.38 $\mu g/m^3$, for nickel 8.16 $\mu g/m^3$, and for zinc 185.01 $\mu g/m^3$.

the Genesee permit allows a particulate matter control efficiency of 0.03 lb PM/MMBtu. As a result, ALAM argues that the predicted concentrations listed in Table 3 are understated and "should have been increased by a factor of at least 50% to be truly reflective of the toxicant emission potential of the facility." ALAM Petition, at 22.

MDNR responds that Table 3 in the Staff Activity Report Addendum gives the *expected* concentrations of trace metals in emissions. MDNR states that, based on limited stack test emission data for particulate matter from similar facilities in Michigan, MDNR expects the ESP to achieve a particulate matter control efficiency of approximately 0.02 lb PM/MMBtu. MDNR states, however, that the allowed emission limitation for particulate matter, 0.03 lb PM/MMBtu, is based on a value (as determined by BACT) that the facility could consistently achieve. MDNR states further that, even if it increased the predicted concentrations of toxic metals by 50% as suggested by ALAM, the predicted ambient impact of the toxic metal emissions would still be orders of magnitude below the ambient impacts allowed by Commission Rule 230 (the Michigan Air Toxics Regulation).

We are satisfied with MDNR's explanation of the disparity. It is customary to establish emissions limitations based on realistic operating parameters, rather than on results that are only occasionally achievable. *See In re Pennsauken County, New Jersey, Resource Recovery Facility,* PSD Appeal No. 88–8 (Adm'r, April 20, 1989). Accordingly, review of this issue is denied.

The Burning of Non-Wood Materials: Condition 39 of the final permit imposes the following prohibition against burning non-wood materials at the facility:

> Applicant shall not burn any non-wood material including pelletized paper, asphalt shingles, vinyl siding, tires, municipal solid waste, medical wastes, or hazardous waste as defined by state and federal law.

Despite this condition, ALAM contends that the permit allows the facility to burn many non-wood materials, particularly pelletized paper, and suggests that the burning of such non-wood materials should be regulated under the new source performance standards for municipal waste combustors at Subpart Ea of 40 CFR Part 60. With respect to pelletized paper, ALAM points out that the permit application includes pelletized paper in its description of the fuel to be burned at the facility. Additionally, it contends that, because

the prohibition against burning "non-wood" items in Condition 39 is not clearly defined, the permit may allow the burning of materials having both wood and non-wood components, such as particle board (with binders), tar paper, sawdust or cellulose sorbents saturated with oil, construction plastics that are mixed with wood, and wood blocks or pallets that have received spills of chemicals. ALAM asks rhetorically: "Are not many of these wastes really equivalent to Subpart Ea wastes as mixed municipal solid waste, and be [sic] more appropriately subject to the requirements for co-fired or municipal waste combustors, notwithstanding the current definition of 'municipal solid waste' in the current EPA rule?"

We believe that ALAM's concerns about the burning of pelletized paper are unfounded. The permit specifically prohibits the burning of pelletized paper at the facility. In light of this prohibition, the fact that the permit application includes pelletized paper in its description of the fuel to be burned at the facility is of no consequence. When permit and application conflict, the permit necessarily prevails over the application. *See* 40 CFR §52.21(i) (PSD requirements imposed on stationary source or modification through permit).

ALAM also fears that, despite the prohibition on burning non-wood materials in Special Condition 39, the permit will nevertheless allow Genesee to burn materials that have both wood and non-wood components. We agree that Condition 39 allows Genesee to burn at least some materials that contain both wood and non-wood components. For example, we do not read Condition 39 as prohibiting the burning of particle board and plywood. Both types of materials have a non-wood component that binds together the wood components. The non-wood component in each functions as an intergral part of the material as a whole, so that it would not make sense to treat the binding agent as a non-wood material distinct from the wood material. For similar reasons, we also do not read Condition 39 as prohibiting the burning of wood that has been coated or stained or marked with a non-wood substance, such as paint (*but see* discussion of fuel cleaning *supra*). With such materials, the non-wood component has as a practical matter become inseparable from the wood component, so that it does not make sense to treat the non-wood component as a distinct material. This interpretation of Condition 39 is suggested by the fact that MDNR removed from the permit a flat prohibition on the burning of painted wood or wood treated with pesticides because MDNR believed such a prohibition was impossible to comply with. *See* MDNR Response to Petitions, at 6. Thus, we agree with ALAM that Condition 39 does allow the burning of

certain materials that contain both wood and non-wood components; however, we do not share ALAM's fears that Condition 39 therefore constitutes a gaping loophole through which all manner of non-wood materials can be squeezed. We believe Condition 39, as written, is sufficiently stringent to preserve the facility's essential character as a wood-waste burning facility.

Finally, ALAM appears to be arguing that the new source performance standards at Subpart Ea of Part 60 *should* apply to Genesee's facility even if they do not apply to it now. But whether the new source performance standards for municipal waste combustors should, as a matter of public policy, extend to some activity that they do not now encompass is not an issue that the Board can address in the context of a PSD permit appeal. *See In re Suckla Farms, Inc. and City of Fort Lupton, Colorado,* UIC Appeal Nos. 92–7, 92–8, at 15 (EAB, June 7, 1993) (permit appeal may not challenge distinction drawn in the regulations); *In re Ford Motor Company,* RCRA Appeal No. 90–9, at 8 n.2 (Adm'r, Oct. 2, 1991) ("Section 124.19, which governs this appeal, authorizes me to review contested permit conditions, but it is not intended to provide a forum for entertaining challenges to the validity of the applicable regulations.").

For all the foregoing reasons, ALAM's concerns about the burning of non-wood materials do not provide a basis for review.

Secondary Emissions: ALAM argues that, despite significant problems at other demolition-related sites in Michigan with demolition waste pile fires, nothing in the fugitive emission control plan or elsewhere in the permit regulates, prevents, mitigates, or prohibits this secondary emission problem. In response, MDNR acknowledges that fires have occurred at some tire processing facilities or material processing facilities in Michigan, but points out that ALAM has not cited, and MDNR does not know of, any fires at wood-burning facilities.

The Board is of the view that ALAM has not carried its burden of showing that its concerns about fires in the waste pile of the proposed facility warrant review. ALAM has not only failed to cite any instances of fire at a wood-burning facility; it has also failed to provide any discussion of how the handling of wood waste at the particular facility under consideration presents a real possibility of fire, requiring a change in the permit. Accordingly, review of this issue is denied.

Michigan's Ability to Enforce Permit Conditions: ALAM argues that Michigan does not presently have adequate legal authority to effectively and practically enforce against violations of the emissions limitations in the permit. This issue relates not to the terms of the permit, but only to the State's ability to enforce a validly issued permit. As such, it is not an issue the Board can address in the context of a PSD permit appeal. *See In re General Electric Company,* RCRA Appeal No. 91–7, at 9 (EAB, November 6, 1992) (EAB's purpose is to determine whether permit was appropriately issued; EAB has no oversight responsibility for implementation of a validly issued permit); *In re Brine Disposal Well, Montmorency County, Michigan,* UIC Appeal Nos. 92–4, 92–5, 92–6, and 92–6A, at 13 (EAB, July 22, 1993)(same). Accordingly, review of this issue is denied.

Regulatory Status of Other Facilities: ALAM contends that Genesee was required under Clean Air Act Section 173(a)(3), 42 U.S.C. § 7503, to show that all major stationary sources owned or operated by it (or by any entity controlling, controlled by, or under common control with Genesee) are in compliance with applicable emissions limitations and standards under the Clean Air Act.[30] We disagree. Section 173(a)(3) is found in Part D of the Clean Air Act, which applies to new source review in non-attainment areas. PSD permits, on the other hand, are governed by Part C of the Act. A PSD permit applicant need not make the showing required by Section 173(a)(3) to obtain a PSD permit. Accordingly, review of this issue is denied.

D. *Filing Requirements*

Untimely Petitions: A petition for review appealing a final PSD permit decision must be filed with the Board within 30 days after the final permit decision has been issued. 40 CFR § 124.19(a). Section 124.19(a) provides that:

> The 30 day period within which a person may request review under this section begins with the serv-

[30] Under Section 173(a)(3), a permit for a new or modified major stationary source in a nonattainment area may not be issued unless

> the owner or operator of the proposed new or modified source has demonstrated that all major stationary sources owned or operated by such person (or by any entity controlling, controlled by, or under common control with such person) in such State are subject to emission limitations and are in compliance, or on a schedule for compliance, with all applicable emission limitations and standards under this chapter; * * *.

42 U.S.C. § 7503.

> ice of notice of the Regional Administrator's [or the State's] action unless a later date is specified in that notice.

In this case, the Commission served the notice on December 7, 1992, and did not specify a later date for appealing the decision. Because service of the notice was by mail, three (3) days are added to the appeal period. 40 CFR § 124.20(d). Thus, the appeal period was 33 days long, and the 33rd day fell on January 9, 1993. Because January 9th was a Saturday, however, the appeal period actually ended on January 11, 1993. *See* 40 CFR § 124.20(c)("If the final day of any time period falls on a weekend or legal holiday, the time period shall be extended to the next working day."). Violet Worthington sent a letter objecting to the permit dated February 20, 1993. Cherie N. Misner sent a letter objecting to the permit dated March 14, 1993, and Sister Marjorie Polys sent a similar letter that was received by the Board on April 3, 1993. The Board is treating these three letters as petitions for review, and denying review of them because they were not filed in a timely manner.

Robinson and O'Neal Petition: Lillian Robinson and Janice O'Neal, representing the Flint/Genesee Neighborhood Association, submitted a petition for review that consists of a cover letter along with copies of the following documents: written testimony submitted to the Commission by ALAM; letter and supporting materials submitted to MDNR by North American Environmental Services; letter from Father Phil Schmitter and Sister Joanne Chiaverini to William Rosenberg of EPA; a letter from Father Phil Schmitter and Sister Joanne Chiaverini to Herb Tate of EPA; letter and supporting materials to MDNR from Grayling Generating Station. The cover letter accompanying these documents, however, does not itself raise any issues for review. A cover letter that does not raise any issues for review together with copies of parts of the record does not satisfy the requirements for filing petitions for review in Section 124.19(a). To satisfy those requirements, the letter accompanying the parts of the record must itself raise issues. Because the cover letter submitted by Lillian Robinson and Janice O'Neal does not itself raise any issues, we are denying review of their petition. *See LCP Chemicals—New York (Division of The Hanlin Group, Inc.,* RCRA Appeal No. 92–25, at 4 (EAB, May 5, 1993) (to satisfy the requirements of 40 CFR § 124.19(a), "it is not enough for a petitioner to rely on previous statements of its objections, such as comments on a draft permit; a petitioner must demonstrate why the Region's response to those objections (the Region's basis for its decision) is clearly erroneous

or otherwise warrants review."); *Adcom Wire, d/b/a/ Adcom Wire Company,* RCRA Appeal No. 92–2, at 10 (EAB, September 3, 1992) (same).

Deloney Petition: E. Hill Deloney, President of the Flint Branch of the NAACP, filed his petition on January 18, 1993, a week after the appeal period had ended. In addition, Mr. Deloney's petition does not itself raise any issues, but merely incorporates testimony presented by Mr. Deloney at the October 27, 1992 public hearing. Because Mr. Deloney's petition was not filed within the appeal period and because the petition does not itself raise any issues but merely incorporates testimony given at the public hearing, we are denying review of his petition. We note that, although we are denying Mr. Deloney's petition, the argument raised in that petition was also raised in the petition of the Society for Afro-American People, the merits of which are fully considered and addressed in this opinion.

Elston and Strong Petition: Linda Elston and Betty Strong submitted a petition for review, containing a long list of objections to the permit. With the exception of one issue, however, the issues are stated with such brevity and lack of specificity that they cannot satisfy Section 124.19(a). For example, the following is a partial list of the issues raised in their petition:

1. closeness to bulk storage gas tanks
2. closeness to residences
3. closeness to Mott Lake and a live stream
4. closeness to Genesee County Parks [with list of parks]
5. air pollution from smokestack
6. air pollution from fuel pile
7. water pollution
8. water well pollution
9. nuisance of noise—no noise assessment done
10. nuisance of smell

Petition of Linda Elston and Betty J. Strong, at 2. As noted above, a PSD permit ordinarily will not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. *See* 40 CFR § 124.19; 45 Fed. Reg. 33,412 (May 19, 1980). The burden of demonstrating that review is warranted is on the petitioner. With the exception of one issue (relating to the December 1, 1992 public hearing), the issues raised by these two citizens are not stated with enough specificity and substance to carry this burden.

Furthermore, their petition does not identify the specific permit conditions being challenged. *See LCP Chemicals—New York (Division of The Hanlin Group, Inc.,* RCRA Appeal No. 92–25, at 5 (EAB, May 5, 1993) ("It is not this Board's obligation to search through the permit for the specific permit conditions that fall into [the Petitioner's] general categories of objections."). Accordingly review of those issues is denied. The issue relating to the December 1, 1992 meeting is similar to issues raised by other petitioners, and all such issues are addressed above in Section B of this opinion, concerning public participation in the permitting process.

Soderstrom Petition: Robert M. Soderstrom, M.D., filed a petition for review on behalf of the Genesee County Medical Society ("Society"), consisting of a cover letter accompanied by written testimony that was submitted by the Society at the December 1, 1992 meeting. The cover letter states as follows:

> We feel there is likely to be poor control over the possible contaminants that could be included with "demolition" wood and consequent emissions.
>
> Michigan's air pollution control laws are far from the best in the country and oversight capabilities have been greatly diminished in recent years because of funding cuts.

The issues raised in Dr. Soderstrom's cover letter are not stated with sufficient specificity to satisfy the requirements of Section 124.19(a). Nor does the inclusion of a copy of the Society's public comments on the draft permit meet the requirements of Section 124.19(a). *See Adcom Wire, d/b/a/ Adcom Wire Company, supra.* Furthermore, to the extent Dr. Soderstrom is urging the imposition of stricter fuel cleaning requirements to control toxic emissions, that issue was addressed earlier in the decision. In addition, the issue relating to Michigan's enforcement capability does not fall within the Board's jurisdiction. Accordingly, review of Dr. Soderstrom's petition is denied.

III. *CONCLUSION*

Except for the issue relating to fuel cleaning as BACT for lead, review of the petition of the American Lung Association of Michigan (ALAM) is denied. With respect to the fuel cleaning issue, the permit is remanded so that the Commission may consider fuel cleaning in its BACT determination for lead. The petition of the Society of Afro-

American People is denied because there is no support in the record for Mr. Dicks' claim of environmental racism. The petition of the Flint Branch of the NAACP is denied because it was not filed within the appeal period and because it does not itself raise any issues but merely incorporates testimony presented at a public hearing. The petition of the Flint/Genesee Neighborhood Association is denied because it merely incorporates other documents and does not itself raise any issues for review. The petition of the Genesee County Medical Society is denied because the issues it raises are not stated with sufficient specificity to allow for meaningful review. The petitions of Violet Worthington, Cherie N. Misner, and Sister Marjorie Polys are denied because the petitions were not filed in a timely manner. With respect to all but one issue, the petition of Linda Elston and Betty Strong is denied because the issues raised in their petition are not stated with sufficient specificity to permit meaningful review. With respect to the remaining issue, review is denied because the petition does not demonstrate a clear error or an important policy consideration.

So ordered.